



The American Bar Association Criminal Justice Section Newsletter

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The Chair's Message

By Stephen Saltzburg

2008 Spring Conference in Charleston

Looking toward the 2008 Spring Conference, we have assembled many of the outstanding lawyers from the ABA Criminal Justice Section and some of the finest prosecutors and defense lawyers in South Carolina and surrounding states to demonstrate direct and cross examination in a CLE program that we believe will be as exciting as the Fall plea bargaining conference we held in Washington, D.C. in November.



The drama that occurs when a key witness is called to testify on direct examination and faces a cross-examination that may either confirm the witness's credibility or destroy it will be present all day as we watch skilled lawyers parry with one another. With experienced federal and state judges presiding over the demonstrations, the authenticity of real trials will be evident throughout the program. Instead of juries making the call on credibility, you will judge the success or failure of the demonstrators along with a panel of lawyers who will dissect each of the demonstrations immediately after they are completed.

Well known and respected prosecutors such as Barney Giese, of Columbia and William Shepherd of Palm Beach will show how a direct examination can tell a powerful story, weaving together fact and opinion to prove the elements of a case through direct and circumstantial evidence. Star defense lawyers such as Albert Krieger and Bart Daniel will demonstrate how to neutralize a direct examination and, when appropriate, attack the credibility of a government's witness. It should be a contest of skill and experience, and a delight to behold. I hope to see you in Charleston!

Please refer to page 11 of the Newsletter for registration information, and for a complete Conference agenda, visit www.abanet.org/crimjust/calendar

I would like to thank Nelson Mullins Riley & Scarborough LLP, Gedney M. Howe, III, the South Carolina Bar, the Charleston School of Law, the South Carolina Solicitor's Association, and the South Carolina Association of Criminal Defense Lawyers for co-sponsoring the conference and I invite you to join us in the Palmetto State for a day of programs and panel discussions presented by experts from across the country who will address breaking issues and new developments in direct and cross examination.

And finally, don't forget to join us for important policy discussions at committee and Council meetings.

CJS Calendar of Events

Feb. 6-12 : **ABA Midyear Meeting**, Los Angeles, CA
Criminal Justice Section Programs and Meetings (Feb. 7-9)
Wrongful Convictions: Causes and Cures (Feb. 8)

Feb. 14-15: **Gaming Law Minefield**, Las Vegas, NV

March 5-7: **National Institute on White Collar Crime**, Miami, FL

March 15: **Confronting the Crisis: Current State Initiatives and Lasting Solutions for California's Prison Conditions**, San Francisco, CA

April 3-6: **Criminal Justice Section 2008 Spring Conference and Meetings**, Charleston, SC
Superior Direct and Cross Examination (CLE, April 4)

May 9-10: **The Comparison of Jury Trials and the Mystery of Art Theft**, Bilbao, Spain

Aug. 7-12: **ABA Annual Meeting**, New York, NY
Criminal Justice Section Programs and Meetings

(See the Section website, www.abanet.org/crimjust, for more details and updates.)

Inside This Issue:

Practice Tips

Ethics

Section News & Events

Policy Update

News from the Field


SECTION NEWS

Conference Explores Obstacles Persons With Criminal Records Face in Finding Employment

The ABA Commission on Effective Criminal Sanctions held the *Conference on Fair Use of Criminal Records in Employment* at the George Washington University School of Law on Jan. 12. Professors Harry Holzer of the Georgetown Public Policy Institute and Al Blumstein of the Carnegie Mellon's H. John Heinz III School of Public Policy and Management both presented research findings on employer attitudes toward people with a record, and long-term risk of recidivism. The conference sought to broaden the discussion within the Bar of how criminal record information is used in making employment decisions, and of the problems created by unwarranted discrimination against people with a criminal record. For more information visit <http://www.abanet.org/dch/committee.cfm?com=CR209800>

Governor of New York Wants Ron Goldstock On the Waterfront

Ron Goldstock, a former chair of the Section and the current Budget Officer was recently nominated by New York Governor Eliot Spitzer to serve as Commissioner of the Waterfront Commission of New York Harbor. Citing his expertise battling racketeering and organized crime in

both the private and public sectors for almost 30 years, Gov. Spitzer said Goldstock's "wide-ranging professional experience makes him the ideal candidate for New York's Commissioner of the Waterfront Commission of New York Harbor." The Waterfront Commission of New York Harbor was established in 1953 to investigate and deter criminal activity and influence in the Port of New York and New Jersey. The inter-state agency has one Commissioner from New York and another from New Jersey. Over the years, in addition to serving as a watchdog for the New York Harbor, the Commission also ensures that the Port follows fair employment and hiring practices. Goldstock's appointment is pending conformation by the New York State Senate.

Professor to Release Publication Examining How Technology Affected Surveillance Techniques

Professor Clifford Fishman, of Catholic University, announces with a mixture of pride and exhaustion the forthcoming publication of the third edition of his two-volume treatise, *Wiretapping and Eavesdropping: Surveillance in the Internet Age*, by Thomson-West. His co-author is Anne McKenna. The treatise includes extensive coverage of computer law and technological surveillance of all kinds, and provides detailed guidelines for judges, prosecutors, defense attorneys and civil practitioners. Prof. Fishman also awaits the forthcoming publication, in the University of Washington Law Review, of his article, "Defense Counsel Access to a Prosecution Witness's

Psychotherapy or Counseling Records." He is currently undergoing therapy for an advanced case of Footnote Withdrawal Syndrome.

CJS Subcommittee to Co-Sponsor Symposium Addressing Wrongful Conviction Issues

The Innocence Subcommittee is cosponsoring a symposium at Southwestern Law School entitled "Wrongful Convictions: Causes and Cures" during the ABA Midyear Meeting in Los Angeles. The Criminal Justice Section has focused extensively on how to reduce the risk of convicting the innocent, while increasing the likelihood of convicting the guilty. Nine resolutions originated by the Innocence Subcommittee have been adopted by the ABA House of Delegates. The resolutions address Systemic Remedies, False Confessions, Eyewitness Identification Procedures, Forensic Evidence, Jailhouse Informants, Defense Counsel Practices, Investigative Policies and Personnel, Prosecution Practices, and Compensation for the Wrongfully Convicted. This work has been published in a report entitled: *Achieving Justice: Freeing the Innocent, Convicting the Guilty*, which is co-edited by the Committee's co-chairs, Professors Paul Giannelli and Myrna Raeder. Professor Raeder who teaches at Southwestern has organized the upcoming Law Review Symposium to highlight these issues as well the role of the media in wrongful conviction litigation. A number of Committee members as well as others will speak, including Professors Rory

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Little, Paul Giannelli, Jennifer Mnookin, Myrna Raeder, Andrew Taslitz, William Thompson, Gerald Uelmen, and Kenneth Williams, as well as Dino Amoroso, Judge Arthur Burnett, Sr., Barry Fisher, Gigi Gordon, and Henry Weinstein. Peter Neufeld, Co-director of the Innocence Project, is scheduled as the luncheon speaker. An entire issue of the Southwestern Law Review will be devoted to the presentations and articles presented at the Symposium, which is also expected to include the ABA report. More information is available at www.swlaw.edu/pdfs/lr_wrongfulconvictions.pdf. To order a copy of *Achieving Justice: Freeing the Innocent, Convicting the Guilty* go to www.abanet.org/crimjust/pubs

Numerous Section-Sponsored Programs Made for a Busy Fall

As the leaves began to turn and the temperatures dropped, attendance was high and the criminal law issues were plenty at the various Section-sponsored programs that took place during the fall season.

Topics addressed by the various programs included: international criminal investigations and their defense; criminal enforcement of intellectual property rights; the lengths the government will go to subpoena journalists and their confidential sources; anti-money laundering techniques that bear on international issues such as trade finance and due diligence for correspondent and private banking; and how in-house lawyers evolved from counselors to targets. Below are highlights of a few of the programs:

International Criminal Investigations – Opportunities and Obstacles (Oct. 8)

Exploring a number of legal issues peculiar to international criminal investigations and their defense, and

panel of White Collar counselors discussed the ways defense lawyers can use the laws and procedures of foreign countries to their advantage, and the opportunities and obstacles faced by defense lawyers and the government as they try to gather evidence and build their cases.

State False Claims Act Developments/Federal False Claims Act Practice Strategies and Legal Updates (Oct. 17/Nov.7)

This two-part series brought together the insights of federal and state prosecutors, qui tam counsel and white collar crime lawyers to explore the recent implications of the False Claim Acts, current investigation strategies, government enforcement strategies, and practical strategies in handling False Claims Act matters at the state and federal levels.

Subpoenaing Sources: Lessons From The Libby Case (Oct. 18)

Presentations by a former editor of *The New York Times*, the deputy general counsel of NBC Universal, and an Assistant United States Attorney set the stage for a lively debate among themselves and with the audience about the implications of *U.S. v. Libby* as a test for how far the government can and will go to subpoena journalists and their confident sources – and how the media and lawyers will adjust to the post-Libby era. Program materials – which are available on a limited basis – can be obtained by contacting Robert Snoddy at snoddyr@staff.abanet.org.

ABA/ABA Money Laundering Conference (Oct. 21-23)

For the 20th year the Section teamed-up with American Bankers Association to provide more than 1,200 attendees incisive, up-to-date solutions to the challenges bankers and lawyers face every day such as the latest in assessing, scoring and managing money laundering and terrorist financing risks; identifying

high risk customers and mitigating that risk; and anti-money laundering techniques on international issues such as trade finance and due diligence for correspondent and private banking. More information on the conference is available at www.aba.com/NR/rdonlyres/D114C2EB-A062-4664-85CA-C0FBA4C9F089/49790/webfinalprogram1.pdf

National Institute on Securities Fraud (Oct. 25-26)

Headlined by a keynote address by former Deputy Attorney General Paul McNulty, the program brought together an array of panelists from academia, government and law firms to address topics such as what to do when the government comes calling about the operations of a business client; how to cope with parallel investigations by the SEC, DOJ, and plaintiffs; and the criminal provisions of Sarbanes-Oxley. Materials from the entire national institute can be purchased from the ABA Webstore, www.abanet.org/abastore

Criminal Tax Fraud (Dec. 6-7)

What has become the annual gathering of the tax fraud bar for over two decades, brought together knowledgeable panelists from the defense bar, government and the judiciary to focus on a number of important emerging areas such as the IRS's increased use of money laundering charges and the continuing controversy regarding the application of federal sentencing guidelines. The program also provided its annual general overview of nuts-and-bolts techniques for responding to a criminal tax fraud investigation. To purchase an audio recording of the two-day program, visit the ABA Webstore.

Feedback Welcome

Send to
crimjustice@abanet.org

Three Questions With...

Barry Boss

Co-Chair of the ABA Criminal Justice Section's
Sentencing Committee

By Robert Snoddy

Recent decisions by the United States Supreme Court and the U.S. Sentencing Commission have led to amendments to the Federal Sentencing Guidelines that reduce the disparity between crack cocaine offenses and those offenses involving cocaine powder. You testified on behalf of the ABA before the U.S. Sentencing Commission, and have been involved for some time in the movement to right what many believe to be a fundamental unfairness in the federal sentencing policy. How gratifying of an experience has this been to see changes to the system for the better taking place?

It was extremely gratifying to finally obtain some much overdue relief for individuals who were sentenced under these draconian, disproportionate and racially discriminatory penalties. As I stated in my testimony before the Commission, there is a very fine line between imprisoning the innocent and over-punishing the guilty. Unfortunately, while the former appropriately provokes impassioned rage, the latter often is met with apathy. Although the ABA along with enlightened jurists, prosecutors, defense attorneys and Sentencing Commissioners have long recognized that the crack penalties needed to be decreased, political realities interfered with sound policy-making. To finally see some progress in this area is truly a cause for celebration. However, at the same time, it must be remembered that this is only a small incremental change and, as the Commission noted in its report to Congress, it is far from sufficient in and of itself. The ABA has long-recognized the evils of mandatory minimum sentencing and that will be the next battle front in the effort to reverse the last twenty years of sentencing inequity.

How will these changes affect the Criminal Justice System as a whole – from the number of felons eligible for sentence reductions to the judicial discretion on sentencing terms – and what are some of the concerns voiced by those in the law enforcement community?

In light of the existing statutory mandatory minimum sentences, these changes to the Guidelines in and of themselves will have only a modest impact on judicial discretion and on the total length of sentences for crack offenders. These offenders will remain disproportionately punished compared to cocaine powder defendants. In addition, while the total number of defendants impacted by the amendment has been estimated to be about 20,000, these individuals will be released over the course of many years. While some in the law enforcement community have raised concerns about dangerous and violent predators being released early from prison, it is important to remember that judges are free not to apply the amendment retroactively to any particular defendant.



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The Criminal Justice Section, and the ABA as a whole, have been quite vocal and at the forefront on this issue for sometime. Now that some headway on the movement has occurred what would you suggest section members undertake to ensure this stays in the public eye?

The ABA, through the Kennedy Commission, has been a leading advocate for sentencing reform. In addition to continuing our efforts to roll back mandatory minimum sentencing, we believe that the time is ripe for the Commission and Congress to explore alternatives to imprisonment, particularly for non-violent drug offenders.

For the latest updates on Criminal Justice Section activities, events and resources, see the Section website at www.abanet.org/crimjust

Response from the Department of Justice



Editor's note: Peter Carr, Principal Deputy Director of Public Affairs for the Department of Justice was invited to respond to Barry Boss and submitted the following statement on the DOJ's position on the recent decision on retroactivity and the larger issue on federal cocaine sentencing policy:

Making the revised guidelines for crack cocaine retroactive made thousands of dangerous prisoners, many of them violent gang members, eligible for immediate release. These offenders are among the most serious and violent offenders in the federal system. The Sentencing Commission estimates that retroactive application will require the resentencing of approximately 20,000 offenders. In the coming year, retroactive application will result in the release back into the community of more than 2,500 additional crack dealers than would be released if the rule was not retroactive. In addition to the threat to public safety, retroactive application will divert valuable resources from federal courts and prosecutors for resentencing at a time when violent crime is rising in many vulnerable communities around the country.

We believe changes to federal cocaine sentencing policy, as with systemic changes to federal sentencing more generally, must take place in Congress. Existing statutes embody federal cocaine sentencing policy and represent the democratic will of the Congress. We hope the Commission, the Administration, and the Congress will continue its work together to determine what changes are warranted with input from federal, state and local law enforcement, as well as neighborhoods across the country that have been ravaged by the effects of violent drug trafficking.

Collaboration with law enforcement is especially critical, and should continue in consideration of larger, systemic changes taking place in federal sentencing. We at the Department welcome continued dialogue with Congress on these issues. Creating a sensible, predictable, and strong federal sentencing system is necessary to keeping the public safe and keeping crime rates low. Addressing the debate over federal cocaine sentencing policy is part of this effort.

New Award: Frank Carrington Crime Victim Attorney Award

The new award from the Criminal Justice Section honors the late attorney Frank Carrington, who had a tremendous impact on the crime victim movement in this country. Mr. Carrington founded and served as Executive Director of the Victims Assistance Legal Organization (VALOR) in Virginia, was a Director of the National Organization for Victims Assistance, and was a member of the California Attorney General's Commission on Victims. Following his service on the Attorney General's Task Force on Violent Crime (1981), he was appointed to the President's Task Force on Victims of Crime (1982). From 1980-82, he was Vice-Chair of the ABA Criminal Justice Section's Victims Committee and was its Chairman in 1982-83 when the ABA approved a comprehensive set of *Guidelines for Fair Treatment of Crime Victims and Witnesses* that subsequently served as a significant basis for the reconsideration of the interests of victims by both state and federal governments.

Awardees will be attorneys or legal service providers (including organizations) who have either directly represented specific victims in criminal, juvenile, or appellate courts or who have worked to promote or implement policies to improve the treatment of crime victims in the criminal justice system. For details, see www.abanet.org/crimjust/frankcarringtonaward.doc

Staff Change at the Commission on Effective Criminal Sanctions

April Frazier, Project Coordinator of the ABA Commission on Effective Criminal Sanctions has left the ABA to join the Legal Action Center in New York as the Deputy Director of the National H.I.R.E. Network.

Get E-News?

If you are a member of the Criminal Justice Section and have not opted out on receiving emails from the ABA, you receive monthly E-News, with latest updates on Section activities, policies, events and resources. Please contact the Service Center at 800-285-2221 if you do not receive the E-News.

Section Advocates for Amicus Briefs on Mandatory Citations, Juvenile Sentences, Gun Possession, and Competency Waivers

While ABA policy is to file amicus briefs “sparingly and only when the brief would constitute a significant contribution to the consideration of the issue or issues involved,” the Section has recently identified four U.S. Supreme Court cases it believes warrant such briefs based on ABA policies the Section has promoted. Accordingly, it has initiated three applications to the Board of Governors and signed onto a fourth. In addition, the *ABA Criminal Justice Standards* are central to a fifth application from another Section.

On December 10, the ABA filed an amicus brief in *Virginia v. Moore* (No. 06-1082). Despite a Virginia law requiring citations rather than arrests for such minor offenses, the defendant had been arrested for driving with a suspended license. A search incident to the arrest yielded drugs, and the defendant was subsequently convicted of possession of cocaine with intent to distribute. Upon request of the state of Virginia, the U.S. Supreme Court had granted certiorari to review the state Supreme Court decision affirming the appellate court’s reversal of the conviction. The ABA brief informed the Court about the *ABA Criminal Justice Standards on Pretrial Release* that call for citations in lieu of arrest in minor cases in the absence of other aggravating factors. It also explained the rationale of the Standards and the rigorous approval process that ABA Criminal Justice Standards undergo. The brief was cited by the State in the January 14 oral argument. The application for amicus participation had been submitted by the Criminal Justice Section, and the brief was

drafted by Section Amicus Committee Co-Chair Rory Little and his colleagues Peter Drobac and Jeffrey Mikoni at McDermott Will & Emery LLP.

At its November Council meeting, the Section approved the Juvenile Justice Committee’s request to ask the ABA to file an amicus brief in support of a petition for certiorari in *Pittman v. South Carolina*. The proposed brief would seek U.S. Supreme Court review of the South Carolina Supreme Court’s decision affirming a mandatory minimum 30-year sentence for a 12 year old boy who had murdered his grandparents. The basis for the brief would be the *ABA Criminal Justice Standards on Sentencing* that oppose mandatory minimum sentences, and the *IJA-ABA Juvenile Justice Standards* that prohibit trying 12 year olds as adults. Committee Co-Chair Robert Schwartz is working with the law firm of Ballard Spahr Andrews & Ingersoll in drafting the brief. If approved by the ABA’s Executive Committee, it will be filed by February 1.

On November 27, the Section’s Executive Committee agreed to co-sponsor a subsequently-approved application of the ABA Standing Committee on Gun Violence for a U.S. Supreme Court brief in opposition to a challenge to D.C. handgun possession laws. In *D.C. v. Heller* (No. 07-290), an applicant who was denied registration for a handgun is arguing that the laws violate the Second Amendment. The District of Columbia’s motion to dismiss the case was granted by the District Court for the District of Columbia on the grounds that the Second Amendment does not grant any individual the right to

bear arms, separate and apart from service in the militia; however, a divided panel of the D.C. Circuit reversed – the first time that a federal appellate court has struck down a gun law based upon the Second Amendment. Filed on January 11, the ABA brief informs the Court of ABA policies supporting the long-established interpretation of the Second Amendment that ties the right to possess firearms to service in the militia.

Finally, on January 7, the Section’s Executive Committee approved the filing of an application for an ABA amicus brief in *Indiana v. Edwards* (No. 07-208). In that case, the U.S. Supreme Court will be considering whether states may adopt a higher standard for measuring competency to represent oneself at trial than for measuring competency to stand trial. Defense Committee Co-Chair Jon May is drafting the proposed brief. If approved by the ABA Board of Governors, it will be filed by January 28.

In addition to the applications noted above, the Section of Individual Rights and Responsibilities has submitted an application for an amicus brief based in large part on the *ABA Criminal Justice Standards on Providing Defense Services*. In *Rothgery v. Gillespie County, Texas* (No. 07-440), the Supreme Court will be deciding whether prosecutor involvement is required for the initiation of proceedings in which counsel must be provided. If approved, the brief will be filed by January 24.

See **Committee Updates and Resources** at www.abanet.org/crimjust/committees

Check each Committee Web Pages for recent committee news, updates and resources.

Practice Tip

By Lee Stein

Maintaining Credibility in FCPA Investigations

Federal enforcement of the Foreign Corrupt Practices Act (FCPA) is on the rise. As corporate executives and white collar practitioners well know, this federal statute — enforced by both the Department of Justice (DOJ) and the Securities and Exchange Commission (SEC) — prohibits payment of bribes by American companies to foreign governmental officials to advance a business interest. Stepped-up enforcement results from a combination of factors: an increasingly worldwide, global economy, a desire by the U.S. government to stem public corruption in this country and abroad, and a motivated and capable enforcement team at DOJ and the SEC. With this heightened focus on the FCPA, companies that have an international presence will at some point encounter an FCPA issue — it is inevitable. Companies are best served when they recognize the government's enforcement priorities and respond to them in a strategic way unique to the FCPA.

While DOJ has made FCPA enforcement a priority and has pursued several significant cases — many of which have been prominently described on the front pages of newspapers across the country — it has done so with limited resources. At the DOJ Fraud Section, only a few prosecutors, currently supported by five FBI agents, are totally dedicated to FCPA enforcement. Other

prosecutors from DOJ's Fraud Section and from U.S. Attorneys' offices assist on cases, but those lawyers work on a variety of matters and FCPA enforcement is not their full-time responsibility.

Because of the government's limited resources, it must triage the cases it sees and try to leverage its resources to accomplish as much as it can. This provides a terrific opportunity for a corporation to take control of its own destiny as FCPA issues arise. If the corporation can convince the DOJ that it is forthcoming, committed to full disclosure, and represented by experienced and trustworthy professionals, the government will often allow the corporation to conduct its own investigation, report the results of the investigation and implement self-defined remedial measures. For the company, this is far preferable to responding to grand jury subpoenas, FBI interviews of employees and all the other distractions and expenses associated with a criminal investigation. Certainly, it is far preferable to a criminal prosecution, the likelihood of which is greatly reduced if the company can essentially fill the role traditionally filled by government investigators.

The key to being permitted to control the fate of the company is to establish and jealously guard the credibility of both the company's FCPA lawyers and the company itself. Very often in FCPA cases — more so than in other white collar cases — companies decide to voluntarily disclose allegations of wrongdoing. How disclosure is handled will often decide whether the government will devote some of its scarce resources to the matter, or will count instead on the company to provide the government with information.

Here are some tips:

1. The company should choose a lawyer who will have credibility with the government as being trustworthy and experienced in conducting FCPA investigations.

The government wants to know it has a surrogate upon which it can rely. For example, the pedigree of a former federal prosecutor (i.e., former Assistant U.S. Attorney or DOJ Trial Attorney) usually provides comfort to the government sufficient to allow the internal investigation to proceed under the company's direction. Similarly, the experience of a lawyer who has investigated FCPA matters will reassure the government.

2. Assume at all times that the government is watching every step of the investigation. Maintaining such a mindset will keep the lawyer and company on track to react quickly, gather and preserve all relevant facts and take appropriate remedial measures. This is a wise approach, even if the company ultimately concludes that a voluntary disclosure is not appropriate.

3. Disclosure is about revealing the facts, not litigating the matter. An FCPA disclosure is different than the typical discussion with a prosecutor over whether a case should be pursued. It will not be helpful to the company in the long run to shade the facts, or to be overly selective about what facts are disclosed. If the government believes that it is not receiving all the relevant facts in a forthright manner, the lawyer and the company will have sacrificed their credibility and once sacrificed it can never be retrieved.

4. The objective of the disclosure is to convince the government that it need not devote resources to the

Continued on page 10



Lee Stein is co-chair of Perkins Coie's Investigations and White Collar Defense Practice Group and is a member of the ABA Criminal Justice Section's White Collar Crime Committee.

Kudos from the Section Chair to the Committees

The Criminal Justice Section Committees, their leaders and active members are the lifeblood of the Section and its ability to serve our members and the criminal justice field. I applaud all the excellent work being accomplished by committees, many great examples of which are listed in the policy update of this newsletter. In this column, I am pleased to single out a few individuals and committees for special recognition just as a reminder of the breadth and depth of what we are accomplishing. There are so many good things happening in the Section that I am sure I omitted items that I should have highlighted. I apologize to anyone whom I short-changed.

- The new CLE Board is off to a great start under the leadership of Catherine Beane and has established a collegial working relationship. The Board meets in person and mostly via conference call to keep our CLE programs timely and useful to members. The Board oversees over twenty five programs annually.

- The Rules, Criminal Procedure Evidence and Police Practices Committee is flourishing under the leadership of new Co-Chair Professor David Aaronson and is on track to present to Council a policy proposal on disparate racial impact of police traffic stops.

- The Problems of the Elderly Committee with Co-Chair Lori Levin leading the way has done a great job preparing a program for the ABA annual meeting and developing a resolution on elder abuse for the Mid Year.

- The Race and Racism Committee led by Wayne McKenzie is supporting

a presentation on the Jena 6 at the ABA Mid Year Meeting in Los Angeles and has prepared a grant proposal on Cultural Competency.

- The Victims Committee led by Russell Butler and Meg Garvin is working closely with the Juvenile Justice Committee and staff Kristie Kennedy as Project Director to implement a grant we received from the U. S. Department of Justice to strengthen lawyer knowledge of victims rights. This committee will also be presenting the first Frank Carrington Victims Advocate Award at the ABA Midyear Meeting in Frank Carrington's honor to Mr. Carrington's family.

- The Alternative Dispute Resolution and Restorative Justice Committee led by Robert Keating, Karen Gopee and Kim Kovach is spearheading the implementation of the ABA Board of Governors Enterprise Fund grant "Mediation in Criminal Matters." A part of the grant is implementation of a special program in Anoka County in Immediate Past Chair Robert Johnson's Office that uses an "expeditor" to urge public defenders and prosecutors to enter plea negotiations early before a person languishes in jail costing the county tons of money and triggering collateral consequences to the incarceration.

- Under the leadership of Irwin Schwartz, the Standards Committee has recently published the Criminal Justice Standards on DNA Evidence, obtained Council approval of proposed Prosecutorial Investigation Standards, began reviewing proposed revisions to the Legal Status of Prisoner Standards, and is overseeing Task Forces updating the Prosecution and Defense Function Standards and developing new Standards on

transaction surveillance and diversion/ special courts.

- The Cyber Crime Committee led by Co-Chairs David Goldstone and Christopher Painter has drafted tips for families to protect children from internet predators.

- The White Collar Crime Committee led by Gary Collins and Janet Levine in Cooperation with the CLE Board is developing a training for Regional and Substantive WCC Committee Co-Chairs on how to develop and implement CLE programs and this can be a model for training other committee chairs.

- We are delighted with the number and quality of Regional White Collar CLE programs, 9 programs so far this year, a record number.

- The Magazine Board under the leadership of Vince Aprile does a great job with our main member benefit.

- Criminal Practice Management-Solo and small Firm Committee with Co-Chairs Nina Marino and Sol Wisenberg is planning a reception during the White Collar Crime Institute and is sponsoring a session on DWI at the ABA Midyear Meeting.

- The Communications, Awards and Membership Committee with Cheryl Jacobs and Vincent Aprile as Co-Chairs has done a great job of increasing our attorney membership by 2,100 lawyers in two and a half years a 30% plus increase. We now have 8,500 attorney members and 20,689 members overall.

What an amazing list of accomplishments and this was just a sample! You can see other committee activities in other part of this newsletter and on our web site. Thanks to all our Committee Chairs and Division Executive Directors for jobs well done.

News from the Field

News from the Field provides updates on activities – ranging from upcoming programs and publications to actions taken on all levels and branches of government – that affect the criminal justice community. If you would like to submit something for consideration, contact Robert Snoddy at snoddyr@staff.abanet.org.

City To Partner With University to Create Institute to Study Law Enforcement Strategies

In what is believed to be a first for major cities in America, Dallas will partner with a university to create a research institute dedicated to training officers and developing crime-fighting strategies. The University of North Texas and the city will come together to run the W.W. Caruth Jr. Police Institute at Dallas. The Institute will study, amongst other things, the Dallas Police Department's crime-fighting strategies and best policing practices. Additionally, one of the main focuses of the institute will be training the next generation of leadership in the department, and providing opportunities for officers to earn advanced education degrees. For more information go to <http://www.cftexas.org/PDFs/Dallas%20Police%20Institute%20Jan%208%2008.pdf>

South Carolina Launches Public Service Incentive Program

South Carolina has established the Prosecutors and Defenders Public Service Incentive Program to attract and retain qualified attorneys in specific public service agencies by reimbursing payments made on outstanding law school loans. Up to \$40,000 can be reimbursed on outstanding law school loans per

qualified attorney. After three years of continuous service as a full-time attorney, qualifying attorneys may be reimbursed up to \$1,000 for payments made in the prior calendar year. For more information on the program, visit www.scstudentloan.org.

New NCDA Publication Addresses Effective Ways to Run Prosecutors' Office

The National College of District Attorneys recently released *Managing Prosecutors*, a publication developed to assist supervising prosecutors – these prosecutors may supervise one, ten or perhaps dozens of attorneys and non-attorneys in making sure the office runs efficiently and professionally. The contributors, many of whom are either current or former prosecutors, offer strategies and lessons learned from their experience and research in office management. In addition, several non-prosecutors were also solicited to provide a complete and balanced text. More information on the book is available at http://www.ndaa.org/ncda/ncda_publication_managing_prosecutors.php.

Pew Forum Publishes Collection of Resources Addressing Capital Punishment

The Pew Forum on Religion & Public Life has published a new collection of resources on capital punishment to coincide with United States Supreme Court's hearing of *Baze v. Rees*. Overseen by senior research fellow David Masci, the Pew report explores issues such as the pros and cons of the death penalty; the practice of lethal injection and contemporary decisions rendered by the Supreme Court; a historical synopsis of capital punishment in America; and the status of the death penalty worldwide. The package, which includes an overview, legal analysis, fact sheet on religious groups' positions, public opinion data and other related links is

available at www.pewforum.org/deathpenalty.

Racial Disparities in Sentencing for Drug Offenses Examined in Report

A study released by the Justice Policy Institute found that more than 90 percent of the nation's large-population counties imprisoned African Americans at a higher rate than whites. The study, titled "The Vortex: The Concentrated Racial Impact of Drug Imprisonment and the Characteristics of Punitive Counties," documents racial disparities in the use of prison for drug offenses in 193 of the 198 counties that reported to government entities and is the first study to examine the relationships between these sociodemographic structures and the specific annual rate at which people are admitted to prison for drug offenses, and the first to localize the racially disparate impact of drug imprisonment at the county level. The study didn't break down the types of drug offenses, and did not focus on the performance of prosecutors or defense attorneys. A copy of the full report is available at http://www.justicepolicy.org/images/upload/07-12_REP_Vortex_AC-DP.pdf

Report Examines the Toll of Combating Drugs in America

The Sentencing Project has released a report that examines the burden of the "war on drugs" on the criminal justice system and American communities. *A 25-Year Quagmire: The War on Drugs and Its Impact on American Society* assesses the strategy of combating drug abuse primarily with enhanced punishments at the expense of investments in treatment and prevention. The report documents how the drug war has produced a record expansion of prison

and jail systems and highlights additional indicators of the war's impact on the criminal justice system and communities. The report also provides policy recommendations that can help effectively reinvest government resources in community safety by encouraging comprehensive drug treatment and prevention strategies to address drug addiction. A copy of the report is available at <http://www.sentencingproject.org/IssueAreaHome.aspx?IssueID=5>.

National Summit to Address the Nationwide Rise of Gang Activity

Gang prevention leaders from across the country will descend upon Arlington, VA from Feb. 25-27 to discuss strategies on developing a gang task force and statewide gang intelligence databases, as well as learn what leading agencies are doing to combat the spread of gangs throughout communities nationwide. Sponsored by the Law Enforcement Development Center "The 2008 National Summit on Gang Violence" will feature two days of panels addressing issues such as effective gang case prosecution; understanding the threat of Internet gangs; utilizing existing community services for gang prevention; and dealing with gang involvement in the schools. More information about the summit is available at www.gangsummit.org.

Kings County Releases Findings from Prisoner Reentry Program Study

On February 12, 2008 Kings County District Attorney Charles J. Hynes will formally announce and discuss the findings of a recently published Report on the Evaluation of the agency's ComALERT Prisoner Reentry program. Authored by Bruce Western, Professor of Sociology and Director

of the Multidisciplinary Program in Social Policy and Inequality at Harvard University, the comprehensive study evaluates the innovative program's core components as well as their impact upon ComALERT program participants who were released from state prison between October 1, 2004 and October 1, 2006. The report's findings are expected to offer persuasive evidence that ComALERT participants enjoy a lower recidivism rate than non participants and that the likelihood for recidivist behavior is significantly lower for ComALERT graduates. The program was created in 1999 and encourages the partnering of community and law enforcement resources to enhance public safety. For more information visit <http://www.brooklynda.org/toc/reentry.htm>

Mass. Governor Seeks to Overhaul CORI Rules

Massachusetts Governor Deval Patrick is taking actions to reform the state's Criminal Offender Record Information (CORI) system via Executive Order and legislation that include enhancing law enforcement access to sealed records, fairer state employment practices, and increasing public education of CORI rights. Unveiled on Jan. 11, 2008 the legislation will seek to reform existing CORI policy to emphasize the importance and value to all residents of successful reintegration of ex-offenders. Additionally, the criminal justice initiative would enhance employment opportunities for rehabilitated individuals with criminal records by allowing them to more quickly shield that information from prospective employers, helping to reduce recidivism rates and increasing the likelihood of successful reintegration into society. For more information go to http://www.mass.gov/?pageID=press_releases&agId=Agov3&prModName=gov3pressrelease&prFile=080111_Cori_Reforms.xml

Practice Tip

Continued from page 7

case. To that end, all materials shared with the government should be well organized, clear and presented in a manner consistent with the seriousness of the allegation so the government does not need to spend time trying to figure out what it has been provided. Doing so shows the government that the lawyer and the company are interested in presenting the information to the government in an understandable way, as opposed to simply dropping a stack of paper at the government's feet.

5. The disclosure is not the time to argue the law. There will be plenty of time to talk about the consequences. Debating the law will send the signal to the government that the lawyer is advocating, not disclosing, and as a result the government will begin to question whether it is being provided the straight story.

6. Take care to establish that the company is responsible, understands its obligations to comply with the law and is committed to doing so. This is done by demonstrating that corporate ethics guide the very top of the company, and are disseminated throughout the company by training, awards, messages and other avenues. Think carefully about whether to bring a client representative to the disclosure meeting who can help establish this point, but avoid bringing a client representative who is a fact witness.

7. Understand that the government will use a voluntary disclosure, even one that results in no action, as an opportunity to "kick the tires and look under the hood" of a company's policies. The company should not resist those efforts or be defensive about them. Demonstrating

Continued on page 14

The American Bar Association Criminal Justice Section and The South Carolina Bar Present The 2008 Spring Conference

SUPERIOR DIRECT AND CROSS-EXAMINATION: Demonstrations from Trial Masters of the ABA Criminal Justice Section and the S.C. Bar



APRIL 4, 2008

Francis Marion Hotel Charleston South Carolina

Accreditation has been requested from mandatory CLE states.

Organizational Cosponsors:

- Charleston School of Law South Carolina Bar South Carolina Solicitor's Association South Carolina Association of Criminal Defense Lawyers

Program Sponsors

Nelson Mullins Riley & Scarborough LLP Gedney M. Howe, III

Hotel Information: Francis Marion Hotel 387 King St., Charleston, SC 29403 843/937-8687; 877/756-2121 (Reservation line)

Single/Double \$219.00

All room rates are subject to city occupancy and sales tax. Make reservations directly with hotel, and refer to the ABA Section of Criminal Justice Spring Meeting. The room block expires on March 3, 2008 at 5:00 p.m., after which the hotel will accept reservations on a space-available basis only.

Registration Form: Superior Direct and Cross-Examination

Advance Registration Deadline: March 24, 2008 Register early!

Return to: ABA Criminal Justice Section, 740 15th Street NW, Washington, DC 20005

or fax to 202-662-1501. Contact Carol Rose at 202-662-1519, carolrose@staff.abanet.org

Program Fee (check one): ___Members: \$150; ___Non Members: \$175; ___Law Students: \$25 ___Luncheon only: \$40 (Cancellations must be received by March 27, 2008. Cancellations subject to an administrative fee of \$50.)

Name _____ Organization _____

Address _____

City/State/Zip _____

Telephone _____ Fax _____ Email _____

Payment Info.: Amount: \$ _____ Make check payable to ABA Criminal Justice Section or fill in the credit card information below:

___Master Card ___Visa ___American Express CARD NO: _____ EXPIRATION DATE: _____

SIGNATURE: _____

Policy Update

Policies Going Before the House of Delegates in Feb. 2008

Revised Model Rule 3.8 – Prosecutorial Disclosure of Evidence

The Section Council passed a recommendation to go to the House of Delegates at the Midyear Meeting in February advocating that when a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall: (1) promptly disclose that evidence to an appropriate court or authority; and (2) if the conviction was obtained in the prosecutor's jurisdiction, promptly disclose that evidence to the defendant unless a court authorizes delay, and undertake further inquiry, or make reasonable efforts to cause an investigation, to determine whether the defendant was convicted of an offense that the defendant did not commit. The proposed additions to the ABA Model Rules also advocate that when a prosecutor knows of clear and convincing evidence establishing that a defendant in the prosecutor's jurisdiction was convicted of an offense that the defendant did not commit, the prosecutor shall seek to remedy the conviction. This policy proposal began in the Ethics Committee.

Sentence Mitigation for Youthful Offenders

The Juvenile Justice Committee submitted a policy recommendation, which the Section Council passed, that urges all federal, state, local and

territorial governments to authorize and implement sentencing laws and rules of procedure that both protect public safety and give mitigating consideration to youthful offenders (i.e., those under 18 at the time of their offense who are subject to adult penalties upon conviction) by recognizing mitigating considerations endorsed by the United States Supreme Court in *Roper v. Simmons*, by authorizing and implementing sentences for youthful offenders that are generally less punitive than comparable sentences for older offenders, and by requiring that such offenders generally be eligible for parole consideration at a reasonable point during their sentences and, if parole is denied, be reconsidered for parole periodically thereafter.

Vigorous Prosecution of Crimes Against the Elderly

The Section Council passed a recommendation to go to the House of Delegates at the Midyear Meeting in February urging, amongst other things, the following steps be taken by federal, state, local, and territorial governments and their prosecutors to vigorously prosecute cases of elder abuse, neglect, and financial exploitation; (1) creation of special elder abuse units within the prosecutor's office or designate a specially trained prosecutor to handle elder abuse cases; (2) ensure that the victim assistance/services program within the staffing structure of their offices develop policies, procedures and funding for providing specialized victim services to the elder population due to the unique needs of elder abuse victims and the many types of abuse inflicted on them; and (3) update state criminal statutes dealing specifically with the physical abuse, sexual assault, neglect and financial exploitation of elders and the need to take into account the special nature of elder victims and the types of crimes committed against them. This policy proposal began in the Problems of the Elderly Committee.

Prosecutorial Investigative Standards

The Section Council has approved proposed Criminal Justice Standards on Prosecutorial Investigations and will present them to the House of Delegates in February. The Standards address issues likely to arise when prosecutors become involved in the investigatory stage of the criminal justice process. These include working with law enforcement agencies; contacts with victims, potential witnesses, opposing counsel and the public; decisions to initiate or continue investigations; using undercover agents and confidential informants; employing subpoenas, search warrants, the grand jury, and surveillance techniques; use of non-governmental resources; and responding to suspected misconduct by judges, defense counsel, witnesses, informants, or jurors. The need for oversight of investigations by government agencies and officials is also addressed. By sensitizing prosecutors to the issues and potential pitfalls of various aspects of investigations, the proposed Standards are expected to guide them through their decision making.

Encouraging Identity Theft Pro Bono Programs

The Section is co-sponsoring the Section of Administrative Law & Regulatory Practice's recommendation urging national, federal, state, and local bar associations, in cooperation with state and local pro bono, lawyer referral, and legal aid programs, to establish programs for representation of victims of identity theft who need assistance in recovering from its effects. The recommendation also addresses the fact that victims of identity theft often suffer significant financial and non-financial harms, including harm to credit standing and reputation, but lack the practical and legal knowledge necessary to recover from identity

theft, such as dealing with creditors and law enforcement authorities, correcting business and public records, and otherwise restoring their reputations. The Victims Committee is working with the project.

Model Rule on Conditional Admission to Practice Law

The Section is co-sponsoring a recommendation of the Commission on Lawyer Assistance Programs which calls for the adoption of the Model Rule on Conditional Admission to Practice Law. The resolution, which encourages law students to seek early treatment for substance abuse and/or mental health disorders without fear that professional help would prevent them from obtaining a license to practice law – states that an applicant who currently satisfies all essential eligibility requirements for admission to practice law, including fitness requirements, and who possesses the requisite good moral character required for admission, may be conditionally admitted to the practice of law if the applicant demonstrates recent rehabilitation from dependency or successful treatment for mental or other illness, or from any other condition the court deems appropriate, that has resulted in conduct or behavior that would otherwise have rendered the applicant currently unfit to practice law.

Providing Legal Services to Veterans to Assist in Obtaining Benefits

The Section is co-sponsoring a recommendation of the Section of Litigation that urges Congress to enact legislation, like the Veterans Advocacy Act of 2007, which promotes the provision of legal services to veterans and members of the Armed Forces to assist them in obtaining the full range of health care, benefits and services to which they are lawfully entitled. This policy is consistent with the ABA's

general policy of supporting legal assistance for military personnel, as well as consistent with the ABA's general support of the independence of advocacy and access to legal system.

Establishing Fee Levels for Immigration and Naturalization Benefits

The Section is co-sponsoring the Commission on Immigration's recommendation that supports fee levels for immigration and naturalization benefits that are not so burdensome as to deter eligible applicants from filing. The recommendation further supports: (a) a clearly-defined fee waiver policy and procedures that ensure that waivers are reasonably available to eligible applicants who demonstrate an inability to pay the fees associated with their applications; (b) no fees for applications for humanitarian forms of immigration relief and associated benefits; and (c) appropriation of federal funds for U.S. Citizenship and Immigration Services activities, including application processing when necessary to avoid prohibitively high immigration fees, and for applications for humanitarian forms of immigration relief and associated benefits, and to cover costs that are not directly related to application processing but that benefit the general public such as national security and anti-fraud efforts.

Updating and Improving Immigration Detention Standards

The Section is co-sponsoring the Commission on Immigration's recommendation that supports the issuance of federal regulations that codify the Department of Homeland Security (DHS) Immigration and Customs Enforcement (ICE) National Detention Standards, and supports improvement, periodic review, and increased oversight of detention standards implementation in order to ensure that detained noncitizens and

their families are treated humanely and have meaningful access to counsel and to the legal process. The recommendation supports enforcing the detention standards at all facilities where noncitizens are detained for immigration purposes. Further, the recommendation urges that the least restrictive detention setting be used for individuals and families in immigration detention, and that immigration detainees not be housed with criminal inmates.

Policy in Development

Guidelines Governing Contact with Employees of a Business Organization

The White Collar Crime Committee submitted policy recommendations to the Section Council at the Annual Meeting on August 9-12, 2007 on proposed guidelines under which the government would contact employees of a business organization. The draft analyzes whether the unintended effect of the DOJ's privilege waiver and other cooperation policies has been to encourage certain practices that may run afoul of numerous provisions of the Model Rules of Professional Conduct. The report includes proposed guidelines to address the conflicts and ethical issues implicated by the foregoing practices. The Council asked the committee to seek comments from the ABA Task Force on Attorney-Client Privilege.

Guidelines for Effective Prison Oversight

The Corrections Committee's Subcommittee on Effective Prison Oversight has drafted a resolution that calls for federal, state, local, and territorial governments to take certain prescribed steps to ensure that the public is informed about conditions in correctional and detention facilities for adults and juveniles and that there is greater accountability to the public in

the operation of those facilities. The resolution also urges federal and state governments to establish public entities that are independent of any correctional agency to regularly monitor and report publicly on the conditions in all prisons, jails, and other adult and juvenile correctional and detention facilities operating within their jurisdiction.

Limiting Access to Criminal History Information

In May 2007, the Commission on Effective Criminal Sanctions began work on a policy recommendation on access to criminal history information. Based on testimony from employers, criminal background screeners, persons with criminal records, media attorneys and civil legal aid attorneys during our Spring Conference, the Commission is considering whether there are any circumstances under which records should be closed or sealed from general public access, and whether credit reporting agencies and others should be prohibited from disclosing records. The Commission is seeking to balance the values of open access and individual privacy that underlie criminal records policy, and the important public safety goals of successful offender reentry and reintegration. The Commission has not yet formally presented any recommendation to the ABA House of Delegates, in light of concerns expressed by the press and business community. The Commission is also considering alternative approaches to neutralizing the effect of a criminal record for employment and other purposes. For more information visit the Commission's website at www.abanet.org/dch/committee.cfm?com=CR209800.

Updating Current ABA Policy on Racial Profiling

The Criminal Procedure, Evidence and Police Practices Committee has

drafted a resolution calling for the updating and strengthening of the current ABA policy on racial profiling by law enforcement agencies. The Committee proposal requires police departments to have a written policy banning racial profiling and focuses not only on training all line personnel but to institute operational supervision to ensure compliance with the policies and training. Unlike the ABA resolutions, the Committee proposal recommends not only analysis of the data, but publication of the data as well. The Committee's recommendation would provide funds – via legislation at the state or federal level – available to implement the policies, especially for training of officers.

Improving Procedural Fairness in the Federal Sentencing Process

The Section Council heard the recent recommendation of the Sentencing Initiative of the Constitution Project regarding improving procedural fairness in the federal sentencing process. Specifically, the Council focused on the proposed amendments to Rule 32 of the Federal Rules of Criminal Procedure set forth in the Constitution Project Report which calls for: (1) any party wishing to submit information to the probation officer in connection with a pre-sentence investigation shall, absent good cause, provide that information to the opposing party at the same time it is submitted to the probation officer; and (2) where information provided by a non-party has been used in the preparation of the pre-sentence report or otherwise submitted by the probation officer to the court, the probation officer shall, on request of any party, make such information available to the parties for inspection, copying, or photographing, or, if the information was provided to the probation officer in oral form, the probation officer shall provide a written summary of the information to the parties. The Council did not vote to endorse the recommendation, but will revisit it at its next meeting.

Standards Committee

On November 17, the Standards Committee began a formal review of a revised version of the current *ABA Criminal Justice Standards on the Legal Status of Prisoners*. The Committee expects to present recommended Standards to the Section Council for the first of two readings in the fall of 2008. Standards Task Forces are drafting proposed revisions to the *ABA Criminal Justice Standards on the Prosecution and Defense Function* and developing new Standards addressing transaction surveillance and diversion and special courts.

Complete copies of recommendations and proposals mentioned in this article are available at the Section's policy page at www.abanet.org/crimjust/policy

Practice Tips

Continued from page 10

a legitimate interest in having an effective and robust compliance program is essential to resolving an FCPA allegation on favorable terms.

Of course, voluntary disclosure is not the right course in all FCPA matters. Many factors may affect this call, including the seriousness of the conduct, the country at issue, and whether the matter must otherwise be disclosed in public SEC filings. But in the many cases where disclosure is appropriate, the manner of the disclosure is critical. If confrontational and difficult, the disclosure can lead to a heightened government involvement and distrust. But if handled with a cooperative approach, the disclosure can foster respect and trust by the government, and often a less severe result. Taking a few small but meaningful steps to establish and maintain credibility will pay enormous benefits for the company and the lawyer in the long run.

Update on Attorney Professionalism and Ethics

The following cases are reported on in greater detail in the *ABA/BNA Lawyers' Manual on Professional Conduct*, a multivolume reference and notification service that reports on issues relating to ethics and professionalism for lawyers. The publication may be obtained by contacting BNA at 1-800-372-1033 or customer care@BNA.com. For a free trial subscription go to www.bna.com/products/lit/mopoc.htm.

Multiple Representation Requires Disclosures Molded to Particular Circumstances

The Arizona State Bar's ethics committee advised in a recent opinion that when a lawyer is preparing to undertake representation of two or more clients in a single matter, they must first figure out whether potential conflicts among the clients are consentable, and then discuss the pros and cons of multiple representation before asking each client to provide informed consent confirmed in writing. The committee, which acknowledged that no one-size-fits-all template can be crafted for the disclosures needed to obtain informed consent, should cover the implications of possible conflicts in testimony and settlement positions, amongst other things. For greater detail, see *ABA/BNA Lawyers' Manual on Professional Conduct*, Vol. 23, No. 25, p.621 (Dec. 12, 2007)

It's OK to Put In Your Two Cents

The Louisiana State Bar Association's ethics panel advised in an opinion that a lawyer not representing anyone in a matter may provide a second opinion to a person who already has counsel in the matter without first obtaining the other attorney's permission. According to the opinion, when a lawyer does not yet represent anyone in a matter Rule

4.2s constraints on communications are simply not triggered and therefore do not prohibit the lawyer from communicating with a person the lawyer knows is already represented in the matter. For greater detail, see *ABA/BNA Lawyers' Manual on Professional Conduct*, Vol.23, No. 24, p. 597 (Nov. 28, 2007)

Defendant Gives Lawyer Bogus Documents, Turns Him Into Witness for the Prosecution

The Mississippi Supreme Court ruled that fraudulent documents a criminal defendant provided his attorney with on the day of trial were not covered by the attorney-client privilege, and the defendant's delivery of the documents rendered his attorney ineligible to proceed as counsel by turning the attorney into a prosecution witness. The court decided that the documents and the defendant's act of turning them over to his attorney were not confidential and that, even if they were, they were subject to the crime-fraud exception to the privilege. See *Hayden v. State*, Miss., No. 2006-KA-00854-SCT, 11/15/07. For greater detail, see *ABA/BNA Lawyers' Manual on Professional Conduct*, Vol.23, No. 24, p. 589 (Nov. 28, 2007)

California Commission Encourages Judges and Jurists to Keep a Watchful Eye in Court

A recent study by The California Commission on the Fair Administration of Justice that sought ways to prevent wrongful convictions proposed a new court rule and an amendment to the state judicial conduct code to encourage jurists to report misconduct by prosecutors and defense lawyers. The commission's report concluded that misconduct by prosecutors and incompetent

representation by defense lawyers is seriously underreported, and in order to boost reporting a new court rule should be created that would spell out judges' obligation to notify the state bar if a criminal defendant's conviction is overturned due to an attorney's misconduct. For greater detail, see *ABA/BNA Lawyers' Manual on Professional Conduct*, Vol.23, No.22, p. 559 (Oct. 31, 2007)

Defense Counsel Consent Is Needed Even If Accused Requests Interview

The Minnesota Supreme Court declared that a county attorney did not satisfy the ethics rule that governs communications with represented persons merely by giving defense counsel notice of impending police interrogations of the accused and offering defense counsel an opportunity to attend the interviews. Furthermore, the court ruled that unless the state obtains a court order authorizing the communication or the communication is authorized by law in some other way, a prosecutor who is consulted about upcoming police interrogations of a represented criminal defendant must obtain defense counsel's consent before the police have any communication with the defendant about the subject of representation. See *State v. Clark*, Minn., No. A06-1765, 9/13/07. For greater detail, see *ABA/BNA Lawyers' Manual on Professional Conduct*, Vol.23, No. 21, p. 523 (Oct. 17, 2007).

SAVE THE DATE

April 3-6

Criminal Justice Section
2008 Spring Conference
and Meeting

Charleston, SC

Superior Direct and Cross
Examination (CLE, April 4)

NEW BOOKS

ABA Standards for Criminal Justice, Third Edition: DNA Evidence

The “black letter” Standards contained and discussed in this latest Criminal Justice Standards volume relate to collecting, preserving and use of DNA evidence, DNA testing, pretrial proceedings, trial, post-conviction, charging by DNA profile, and DNA databases.

The “black letter” Standards were approved by the American Bar Association’s policymaking House of Delegates in August 2006. The commentary was approved by the Criminal Justice Standards Committee in July 2007.

Trial Tactics

A compilation of high profile criminal cases, practice tips, legal analyses, and cautions that prepares defense counsel, prosecutors and judges to do outstanding work at trial and assists them in ensuring that justice is done each day in every court throughout the land. The text provides excellent statutory, case law and inside advice by George Washington University Wallace and Beverly Woodbury Professor of Law Stephen Saltzburg. The 54-chapter book is broken down in seven parts: Basic Principles; Examination of Witnesses; Lay and Expert Opinion; Hearsay, Confrontation and Compulsory Process; Character Evidence; Summaries and Exhibits, and; Opening and Closing Arguments.

The Citizenship Flowchart

An easy-to-understand flowchart that provides ultimate answer as to citizenship status by taking user through the complex and sometimes conflicting steps and questions linked to a century of legislation and regulation. This laminated 4-color chart takes you through a process of determining citizenship through a series of yes or no questions. The end result will ultimately make a determination of an individual’s citizenship in the United States. In addition, there are 32 pages of reference text allowing you to examine the basis for the individual questions in more detail if you wish.

For ordering information on these and other Section books, see www.abanet.org/crimjust/pubs

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